

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
COMMUNICATIONS DIVISION

In the Matter of)

Price Cap Performance Review)
for Local Exchange Carriers;)
Treatment of Video Dialtone Services)
Under Price Cap Regulation)

CC Docket No. 94-1

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**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.
IN THE THIRD FURTHER NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION

The National Cable Television Association, Inc. ("NCTA") hereby files its Reply Comments in the Third Notice of Proposed Rulemaking ("Third NPRM") in the above-captioned proceeding.¹

II. DISCUSSION

In its Comments on the Third NPRM, NCTA made three central points: (1) an accounting mechanism for allocating the common costs of video dialtone ("VDT") can be chosen only after the FCC makes an explicit policy judgment as to who shall bear the costs of the VDT upgrade, (2) the FCC should not establish a de minimis threshold below

¹ See Price Cap Performance Review for Local Exchange Carriers: Treatment of Video Dialtone Services Under Price Cap Regulation, CC Docket No. 94-1, Second Report and Order and Third Further Notice of Proposed Rulemaking (released September 21, 1995).

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which VDT investment will be included in sharing, and (3) if the FCC decides it is necessary to establish a de minimis threshold, it should set it at the amount of shared and dedicated VDT investment required to lower the LEC's rate-of-return by 10 basis points. If the Commission does not make the policy choice called for in (1), and leaves the choice to the telephone companies, there is no basis for a de minimis threshold.

The Comments filed in this proceeding offer considerable support in favor of and little substantive opposition to these positions. The LECs, of course, want to obscure the VDT allocation process to maximize their opportunities to cross-subsidize without detection, and therefore oppose an explicit allocation decision. The non-LEC parties, however, generally support NCTA's position on the allocation issue. Moreover, the non-LEC parties oppose the creation of any de minimis threshold. Most parties also agree that, if the FCC decides a threshold is necessary, it should be as low as possible. Those in favor of a high threshold offer unconvincing support for this position.

A. The FCC Must Make An Explicit Policy Decision As To Who Will Pay For VDT Before It Chooses An Accounting Approach For Allocating The Common Costs Of VDT

Most of the non-LEC parties reiterated in their Comments the point they and NCTA have made throughout the VDT proceedings: before the Commission chooses a methodology for allocating the common costs of VDT, it must make a policy decision as to who will bear the cost of the VDT upgrade.² Again, there is no "correct" mechanism

² See Comments of MCI at 7-8 (recommending a 50/50 allocation of the common costs of the upgrade to VDT and telephony); Comments of the General Service Administration ("GSA") at 8 (arguing that

for allocating integrated plant. The appropriateness of approaches such as the new services test or fixed cost allocator mentioned in the Third NPRM can only be determined after the policy choice has been made.

Several LECs argue that the Commission need not adopt any new approach to allocating the common costs of the VDT upgrade, and should instead rely on the existing mechanisms in Part 36.³ As NCTA has explained in the past, however, the Part 36 rules were not designed to perform this task.⁴ The separations rules do not contemplate the delivery of broadband services, such as VDT, and narrowband services, over an integrated facility. So far as we are aware, there is no separations rule by which to perform this allocation.

Thus, as NCTA has repeatedly stated, the Commission must make an explicit policy decision as to who will pay for the integrated facility, and then revise its rules accordingly. Moreover, the Commission cannot rely on existing Part 36 rules to allocate

(..continued)

Part 64 must be amended to account for the proper allocation of the common costs of VDT); Comments of Comcast and Cox at 3-5 (FCC must determine how common costs of VDT will be allocated between video and telephone services before the jurisdictional separations process); Comments of California Cable Television Association ("CCTA") at 14-17 (recommending application of Total Service Long-Run Incremental Cost methodology to allocate common costs of the upgrade).

³ See Comments of Bell Atlantic at 2-4; Comments of Southwestern Bell ("SWB") at 11-12; Comments of Pacific Bell at 4-6; Comments of Southern New England Telephone Company ("SNET") at 2-5.

⁴ See Joint Petition For Rulemaking And Request For Establishment Of A Joint Board filed by NCTA and the Consumer Federation of America (April 8, 1993) at 19-20 ("NCTA/CFA Joint Petition") and Hatfield Associates, Inc., Cross-Subsidy Concerns Raised By Local Exchange Carrier Provision Of Video Dialtone Services, March 29, 1993, submitted as an appendix to the NCTA/CFA Joint Petition at 14-26 ("Hatfield Study").

the common costs of VDT. The Commission must convene a Joint Board to deal with these issues.

B. The FCC Should Not Establish A De Minimis Threshold Below Which VDT Investments Will Be Included In Sharing

Many of the commenting parties agree that the Commission should not establish a de minimis threshold below which investment in VDT would be included in sharing.⁵

There is simply no reason to grant LECs this opportunity to subsidize VDT investment with monopoly revenue streams. This is especially so when, as NCTA explained in its Comments, complete exclusion of VDT investments from sharing would create a minimal administrative burden.

The LECs that plan significant investments in VDT and that elect sharing could use a de minimis threshold to shift VDT costs onto telephone ratepayers. Indeed, in contrast to the LECs that elect the no sharing option, the LECs that have chosen price cap X-Factors that include sharing stress the need to establish a high de minimis threshold.⁶

⁵ See Comments of MCI at 3-6; Comments of Comcast and Cox at 7; Comments of the CCTA at 6-11. Cf. Comments of GSA at 3-5 (recommending \$500 threshold); Comments of SWB at 7.

⁶ Bell Atlantic BellSouth, Pacific Bell and SWB are all currently exempt from sharing obligations while NYNEX, SNET, US WEST and GTE (for 8 of its study areas) are subject to the maximum level of sharing. See Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Fourth Further Notice of Proposed Rulemaking (released September 27, 1995) at ¶ 8. Compare Comments of NYNEX at 3 (supporting dedicated VDT investment/25 basis points standard); Comments of US WEST at 2 (recommending threshold at VDT revenues that exceed 2% of their overall interstate revenues); Comments of SNET at 4-5 (apparently recommending threshold at direct VDT investments that comprise 5% of total plant in service); Comments of GTE at 5-6 (supporting dedicated VDT investment/25 basis points standard) with Comments of Bell Atlantic (no recommendation); Comments of BellSouth (urging that rules not apply to LECs for whom sharing does not apply and, in the alternative, that investments in VDT trials not be excluded from sharing); Comments of SWB at 6 (opposing any decision at this time); Comments of Pacific Bell at 2 (recommending VDT investment that is 1% of LEC's total interstate investment).

Rather than alleviating the administrative burden on the LECs, a de minimis threshold would be simply another opportunity for LECs to subsidize their proposed video services. The Commission should therefore abandon its proposal to adopt such a threshold and should instead require LECs to exclude all VDT investments from sharing.

C. If The Commission Adopts A De Minimis Threshold, It Should Be Extremely Low

If the Commission decides that it is necessary to establish a de minimis threshold below which LEC investment in VDT will not be excluded from the sharing process, it should set it at a low level and ensure that the costs counted include both dedicated and shared investment in VDT.⁷ Our support for a de minimis threshold is contingent upon the Commission's adoption of an explicit policy decision regarding the allocation of common costs. This allocation decision must not be left to the telephone company's discretion. While the allocation decision is arbitrary in terms of economic theory, leaving the discretion to the telephone companies is arbitrary and capricious in terms of statutory requirements.

The cross-subsidy concerns described above dictate that the threshold level should be low. NCTA recommended in its Comments that it be set at the amount of VDT investment that reduces a LEC's rate-of-return by 10 basis points. AT&T offers strong

⁷ There is strong support for this approach among the non-LEC parties. See Comments of AT&T at 3-7; Comments of Comcast and Cox at 6-8; Comments of CCTA at 11-14; Comments of GSA at 3-6.

support in its Comments for its view that the level should be even lower, namely 5 basis points or \$100,000, whichever is greater.⁸

Moreover, it is clear that the threshold should account for both dedicated and shared VDT costs. As several parties pointed out, VDT systems generally have a high proportion of shared costs.⁹ Excluding those shared costs from the calculation of the threshold would simply invite telcos to game the system either by misallocating dedicated costs to the shared category, or by designing systems with high shared costs. Nor is it any more difficult as an administrative matter to include both shared and dedicated costs because they have already been captured in accounts established pursuant to RAO Letter 25.

The Commission should reject LEC proposals that investments in market trials be included in sharing.¹⁰ The extant market trials are “trials” in name only. Their status as “trials” is little more than legal fiction. The Commission should not compound the mistake of authorizing these projects as “trials” by improperly allocating the costs of the projects to telephone ratepayers. Rather, the entire risk should be borne by telephone company stockholders. Moreover, certain of these trials are being conducted by LECs

⁸ See Comments of AT&T at 3-7.

⁹ See Comments of GSA at 5; Comments of Comcast and Cox at 7; Comments of CCTA at 8. Cf. Comments of AT&T at 4.

¹⁰ See Comments of SWB at 9; Comments of BellSouth at 3.

that are subject to sharing obligations.¹¹ Permitting these LECs to mix VDT losses with revenues in other regulated services for sharing purposes would result in telephone ratepayers subsidizing the market trials.

In sum, the Commission must ensure that LECs do not have an opportunity to misallocate *any* amounts of VDT investment through the adoption of a de minimis threshold. If the Commission nevertheless decides to adopt a de minimis threshold, it should be adopted following the establishment of an explicit policy that allocates common costs between VDT and telephony, it should be low, and it should account for both dedicated and shared investments in VDT.

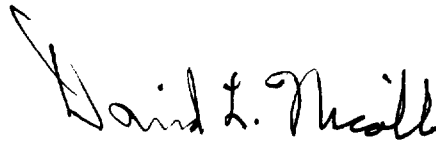
¹¹ As stated above, both US WEST and SNET chose the 4.0% X Factor and are therefore subject to the highest possible sharing requirements.

CONCLUSION

NCTA respectfully requests that the Commission base the allocation of VDT investment on an explicit policy choice as to whom should bear the costs of the VDT upgrade. NCTA also requests that the Commission abstain from adopting a de minimis threshold for VDT investment that is included in the sharing mechanism.

Respectfully submitted,

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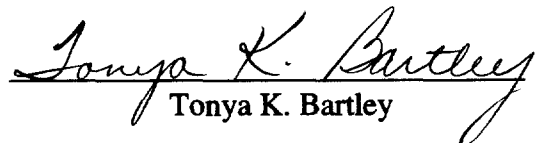
I, Tonya K. Bartley, do hereby certify that on this 20th day of November 1995, copies of the foregoing **Reply Comments of the National Cable Television, Inc.** were hand delivered to the following:

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